No. 93-517, 527, 539

IN THE

Supreme Court of the United States

October Term, 1993

BOARD OF EDUCATION OF THE KIRYAS JOEL VILLAGE SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

[Caption Continued On Inside Cover]

On Petition For A Writ Of Certiorari To The New York State Court Of Appeals

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BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, PEOPLE FOR THE AMERICAN WAY, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, AND THE UNION OF AMERICAN HEBREW CONGREGATIONS

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BOARD OF EDUCATION OF THE MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Petitioner,

v.

LOUIS GRUMET and ALBERT W. HAWK,

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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. It has taken a particular interest in the Establishment Clause, because in its view the separation of church and state is an indispensable safeguard for the religious liberty of American Jews. Moreover, for reasons more fully stated below, it believes that invalidating the Kiryas Joel district does not confront the Court with a choice between a robust conception of non-establishment and providing Hasidic children with serious handicapping conditions an education at public expense.

* * *

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization including the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai

B'rith, Hadassah, Jewish War Veterans of the United States of America, Jewish Labor Committee, National Council of Jewish Women, Union of American Hebrew Congregations, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States (listed in Appendix A).

As the national planning and coordinating body for the field of Jewish community relations, dedicated to preserving the principles embodied in the Bill of Rights, NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans. (The Union of Orthodox Jewish Congregations of America, a NJCRAC member agency, does not join in this brief because of its belief that the Kiryas Joel School District was established for an entirely secular purpose,

constitutes a legitimate accommodation to a religious group, and, consequently, does not violate the Establishment Clause of the First Amendment.)

* * *

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights.

People For has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the fundamental principle of the separation of church and state and the prohibition on

state establishments of religion. As an organization including numerous religious leaders and individuals, People For strongly believes that the creation of the Kiryas Joel School District violates these principles and significantly threatens religious freedom in our country, and that constitutional alternatives are available to provide the children of Kiryas Joel with special education services.

* * *

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. The BJC's members include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship;

National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

* * *

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church, which has more than 7.8 million members worldwide, including some 760,000 in the United States.

The Church believes that Freedom of Conscience includes the right to worship or not to worship, and to profess, practice, and promulgate religious beliefs or to change them. In exercising these rights,

however, it admonishes that government should respect the rights of all citizens, not just those of the majority.

As the surest way of securing full religious liberty, the Seventh-day Adventist Church advocates the separation of church and state commanded by our Lord, who said, "Render therefore unto Caesar the things which are Caeser's; and unto God the things that are God's" (Matthew 22:21). It believes: "The union of the church with the state, be the degree ever so slight, while it may appear to bring the world nearer to the church, does in reality but bring the church nearer to the world." Ellen G. White, The Great Controversy, p. 264 (1974).

The state should never invade the distinct realm of the church to affect, in any way, freedom of conscience; or the right to profess, practice, and promulgate religious beliefs. Conversely the church must avoid the distinctive realm of the state, even in the furtherance of an otherwise valued, public

purpose. Upon these principles the Seventh-day Adventist Church encourages each branch of government to support a high degree of separation between church and state; and a high level of First Amendment rights for churches and their members as they profess, practice, and promulgate their religious beliefs.

• • •

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state, and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.

STATEMENT OF THE CASE

The *amici* adopt the Respondents' statement of the case.

STATEMENT OF THE FACTS

Amici note that the facts are largely not in dispute, and hence do not provide their own statement of the facts.

SUMMARY OF ARGUMENT

1. The creation of the Kiryas Joel School District (KJSD) presents a scenario unusual for this Court -- an actual combination of church and state. That union of civil and religious power runs afoul of the most fundamental principle of the Establishment Clause. The absence of the abuses historically derivative of established religion cannot alter KJSD's fundamental constitutional shortcoming.

2. *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982) is dispositive. There the Court invalidated a church veto over the issuance of liquor licenses because "the statute enmeshe[d] churches in the exercise of

substantial governmental powers contrary to our settled interpretation of the Establishment Clause." There was no evidence in *Larkin* that any church used the statue to further sectarian ends. The defect in that case, as in this one, is the co-joining of politics and religion, of creating political constituencies along religious lines.

3. The *Larkin* holding was firmly rooted in history. The goal of most fully established churches was to ensure that the entire polity shared the same faith, either by coerced conversions of religious minorities, expulsion of religious minorities, or, especially in colonial America, creation of new political jurisdictions founded and organized on religious lines. The Founders were well aware of this feature of establishments; it is at the very core of what they determined, through the Establishment Clause, to forbid.

The abuses that modern Americans associate with established religions -- compulsory taxation or

chapel attendance, prosecution of heretics and blasphemers, official control of church doctrine and liturgy, expulsion of non-believers from the political society are not independent of this principle of identifying church with state. Rather, they are derivative of it, flowing naturally from the fundamental assumption that both church and the state have a mutual interest in furthering a common agenda.

4. The established churches of medieval Europe, reformation England and post-reformation Europe all shared a political theory which emphasized the unity of religion and state. Thus, for example, the European principle of *cuius regio, eius religio*, and the commonlaw prosecution of heresy and blasphemy both proceed under this assumption.

5. Several American colonies, such as Massachusetts and Connecticut were organized along religious lines. Elsewhere, "in the minds of royal governors, religious and political centralization blended into a picture of social order that must be

imposed on the colonies." The franchise was limited on the basis of religion.

6. The Constitution was drafted with preventing both the multiple establishment in existence and the earlier forms in which church and state overlapped. The no-religious-tests clause broke this identification of church and state, and the First Amendment carried that break still further. Subsequent events confirm that the First Amendment was designed to prevent the creation of political jurisdictions defined by religion.

7. Despite the nominal secular nature of the school district, the underlying facts make clear that the sole organizing principle of this District is religion. This deliberate religious gerrymander is as unconstitutional as the racial gerrymander condemned in *Brown* v. *Board of Education*, 344 U.S. 1 (1954).

8. *Lemon* (which as the Court of Appeals correctly held, invalidates KJSD) should not be reconsidered. No special circumstances are shown to

justify a departure from *stare decisis*. *Lemon* is not unworkable, and surely not more so than any other test would be in this difficult area of the law. Petitioners' complaint is with the Establishment Clause, not any particular test. Moreover, *Lemon* itself was solidly rooted in prior cases, including *Walz* v. *Tax Comm'n*, 397 U.S. 644 (1970), the case Petitioners say lays out the correct constitutional standard. By virtue of repeated adjudication *Lemon* has become an integral part of the law. Moreover, recent historical studies demonstrate that *Lemon* and its predecessors correctly understood constitutional history.

9. *Lemon* is not inconsistent with the principle of accommodation. However, KJSD is not an accommodation because it neither lifts any state imposed burden from the shoulders of Hasidic children and because, by creating a political constituency along religious lines, it cuts at the very core of the Establishment Clause. However the tension between

the Free Exercise and Establishment Clauses is reconciled, the core value of each Clause must be preserved.

10. Monroe-Woodbury could have, and should now be ordered to, provide special services to disabled Hasidic children on "neutral sites" such as condoned in *Wolman* v. *Walter*, 433 U.S. 229 (1977). Such sites neither create political constituencies along religious lines nor otherwise violate the Establishment Clause.

ARGUMENT

I
A UNION OF RELIGIOUS AND CIVIL POWER UNCONSTITUTIONALLY ESTABLISHES RELIGION

This case is about formally establishing religion, a real unity of religious and political power. Confronted with this paradigmatic establishment, Petitioners and their *amici* are forced to offer a conflicting hodgepodge of arguments for reversal. Thus, for example, though Petitioners deny that any religious mandate prohibits Hasidic children from

mixing with their non-Hasidic peers, they nevertheless insist that the separate school district is an accommodation of Hasidic religious practice.

Petitioners Kiryas Joel School District ("KJSD") and Monroe-Woodbury School District, joined by many of their *amici*, also call for an overturning of the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). They claim that *Lemon* is historically unfounded, unworkable and leaves in doubt the constitutionality of what are termed, in *ipse dixit* fashion, 'permissible accommodations' [Petitioner Kiryas Joel Brief at 43-45; Petitioner Monroe-Woodbury Brief at 47-79].[1] By whatever tortious route they travel, Petitioners' case rests on the claim that the sole test of whether this case involves an establishment is whether religious instruction takes place in the KJSD.

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1. Significantly, Petitioner New York State does not join in this call.

Petitioners hold a myopic view of this case. In the first place, as we will demonstrate in Point VI, *infra*, the claim that affirmance would leave these vulnerable children without special educational services is simply incorrect. There are constitutional alternatives available with which to provide services to these children consistent with their religious practices; specifically the use of neutral sites, *Wolman* v. *Walter*, 433 U.S. 229 (1977). New York did not need to create -- and could not constitutionally create -- a public school district coincident with a religious community in order to provide these services. New York could have required Monroe-Woodbury to implement one of those constitutional alternatives.

KJSD is not a run-of-the-mill Establishment Clause violation. This unusual case presents this Court with a legal problem it has not often confronted -- an actual union of church and state. It has not confronted it, not because it is a new problem

or one that arises from an unforseen intersection of conflicting lines of authority, but because it involves an old principle, one so old and so plainly settled, and so fundamental to the organization of the political life in the United States for over two centuries, that it is rarely questioned. The dearth of case law invoking this principle is as significant as is the absence of decisions barring the rack and screw to the interpretation of the Eighth Amendment.

KJSD purports to be a secular school district. But KJSD (which offers no regular public school instruction) is, and was intended to be, something quite different. It is a political subdivision co-terminus with a religious community. It is the political embodiment of that religious community. It is literally an establishment of religion whether or not any of the abuses commonly associated with establishments are present.[2]

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2. In this facial challenge, plaintiffs have not yet had an opportunity to prove whether KJSD engages in any of the practices that historically accompany establishments.

Petitioners confuse the absence of those abuses that historically are symptomatic of established religion with the disease itself -- the joining of religion and political power. KJSD argues that the absence of symptoms proves the absence of the disease. That claim is no more valid under the Establishment Clause than in medicine.

Larkin v. *Grendel's Den*, 459 U.S. 116 (1982), is dispositive. In that case, Massachusetts allowed churches to veto the granting of a liquor license sought to be located within a specified distance of a church. The constitutional defect was not in protecting churches from the untoward behavior often associated with liquor sales, but the way in which the state accomplished that end. Massachusetts unconstitutionally conferred political power on churches by granting them the unreviewable discretion to decide whether or not to veto a particular liquor license.

Chief Justice Burger explained for the Court: "This statute enmeshes churches in the exercise of

substantial governmental powers contrary to our settled interpretation of the Establishment Clause."

And he continued:

> Our contemporary views do no more than reflect views approved by the Court more than a century ago: 'The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.'" [citations omitted]

459 U.S. at 126.[3]

Justice O'Connor expressed a similar idea when she explained in *Lynch* v. *Donnelly*, 465 U.S. 668, 688 (1984) (concurring opinion), that one of the purposes of the Establishment Clause was to proscribe a state from choosing to "foster the creation of political constituencies along religious lines."

There was no evidence in *Larkin* that any church had used its powers to further religious beliefs. The

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3. In subsequent cases, Larkin has come to stand for the proposition that government may not delegate political power to religious entities. County of Allegheny v. A.C.L.U., 492 U.S. 573, 591 (1989); Hernandez v. C.I.R., 490 U.S. 680, 697 (1989). New York has done just that by creating KJSD.

fatal constitutional defect in that case was the co-joining of political power with religious prerogatives and creating political constituencies along religious lines, exactly the defect inherent in the creation of KJSD, except that the power conferred, and hence the constitutional violation, is greater here.

The only difference between *Larkin* and this case is that here the legislature sanitized the statute of references to religion. That does not change the substance of what has been accomplished, see Point IV, *infra*, nor should it obscure the magnitude of the constitutional violation. What is true of the Fourteenth and Fifteenth Amendments is no less true of the First. The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." *Gomillion* v. *Lightfoot*, 364 U.S. 339, 342 (1960), citing *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).

This Court, for example, was unanimous in invalidating a facially neutral anti-ritual slaughter ordinance, holding that in fact it was motivated by

anti-religious animus. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 113 S.Ct. 2217 (1993). The First Amendment, this Court said, "protects against government hostility which is masked as well as overt" *Id*. at 2227, for "it is inconceivable that the guarantees embedded in the Constitution of the United States may be manipulated out of existence," *Gomillion* v. *Lightfoot*, *supra*, quoting *Frost & Frost Trucking Co*. v. *Railway Comm'r*, 271 U.S. 583, 594 (1926), by mere cleverness in drafting.

II
THE ACTUAL EXERCISE OF POLITICAL POWER BY RELIGION WAS ONE OF THE HISTORIC EVILS AT WHICH THE ESTABLISHMENT CLAUSE WAS AIMED

The *Larkin* holding was anchored in history:

> At the time of the Revolution, Americans feared not only a denial of religious freedom, but also the danger of political oppression through a union of civil and ecclesiastical control.

459 U.S. at 127, n.10.

That history, it is settled, has a particular significance for interpreting the First Amendment. *PEARL* v. *Nyquist*, 413 U.S. 756, 770-73; *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 14-15 (1947); *Edwards* v. *Aguillard*, 482 U.S. 578, 606 (1987) (Powell, J., concurring); *Wallace* v. *Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

The established religions with which the Founders were familiar were premised on an alignment between the political and religious orders. It was to avoid a repetition of the lachrymose history of two hundred years of wars and persecutions in England and on the Continent that the First Amendment was adopted.

The goal of most fully established churches was to ensure that the entire polity shared the same faith, either by coerced conversions of religious minorities, expulsion of religious minorities, or, especially in colonial America, creation of new political jurisdictions founded and organized on religious lines.

The Founders were well aware of this feature of establishments; it is at the very core of what they determined, through the Establishment Clause, to forbid.

In this century, of course, the full alignment of religion with government is rare. Indeed, Justice Powell went as far as to say:

> [a]t this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of rights. . . . The risk of significant religious or denominational control over our democratic processes -- or even of deep political division along religious lines -- is remote . . . . [citations omitted]

Wolman v. *Walter*, *supra*, 433 U.S. at 263 (Powell, J., concurring); *Mueller* v. *Allen*, 463 U.S. 388, 400 (1983). This case, however, presents not the risk, but the actuality of what Justice Powell termed "significant religious control over our democratic processes." It is accordingly not necessary to apply *Lemon* to know that legislation cloaking a designated church with political power is unconstitutional, or

that coerced participation in religious exercises will not pass constitutional scrutiny. *Lee* v. *Weisman*, 112 S.Ct. 2649 (1992).

A. A Brief History of Establishments

1. Theory

The fundamental idea behind established religion is that the religious polity should and must be identical with the political one. This idea is of ancient lineage. Locke attributed it to the biblical Hebrews. J. Locke, A Letter On Toleration (Prometheus Books 1990) at 51-54.

Established religion addresses a fundamental problem of political organization: how to bind together in an effective common social bond individuals who, left alone, will pursue their own autonomous agendas and interests? A shared religion is one candidate for use as a means of social organization. Religion addresses a broad range of issues, including the ultimate goods and goals of life. Religious beliefs are deeply held and influence behavior. The fear of offending God is a powerful

inducement for compliance with socially necessary rules.[4]

The abuses that modern Americans properly associate with established religions -- compulsory taxation or chapel attendance, prosecution of heretics and blasphemers, official control of church doctrine and liturgy, expulsion of non-believers from the political society, such as the expulsion of the Jews from Spain or the Huguenots from France -- are not independent of this principle of identifying church with state. Rather, they are derivative of it, flowing

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4. For those religions that assert a special claim on truth, the combination of church and state is also entirely logical. Why should not the society function on the basis of God's revealed truth instead of stumbling along, groping for the best way to regulate human affairs, when God has laid it out in the Bible, Koran, or other sacred scripture? Following the dictates of revealed truth avoids communal sin and calling down God's wrath on the community.

At least some religions assert that they are divinely commanded to attend to the social order, which necessarily includes political affairs. Yet other religions are explicitly national in character, such that the political unit is defined by allegiances to national gods. The United States has not escaped this last phenomenon by any means; American literature is full of references to God's special role for America, or America as God's chosen instrument. See G.M. Marsden, Fundamentalism and American Culture, 11-21 (1980).

naturally from the fundamental assumption that both church and the state have a mutual interest in furthering a common agenda.

2. Continental Establishments
a. Pre-Reformation

Those who thought about theological and political issues over the course of hundreds of years -- Aristotle, St. Augustine, Thomas Aquinas, Calvin and Luther -- all struggled with the respective role of church and state.[5] These discussions differed greatly on how to adjust relations between the two, with some, like St. Augustine, insisting on a close partnership between the two. The church and the monarchs of medieval Europe regularly clashed, not over religious liberty, but over who would control the joint enterprise of church and state. See generally, S. Cobb, The Rise of Religious Liberty in America, (reprinted, 1970) at 19-66 (hereafter "Cobb, The Rise").

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5. For a general overview, see L. Strauss and J.Cropsey, History of Political Philosophy (3rd. ed. 1987).

b. Post-Reformation

With the Protestant Reformation, a method short of war had to be devised to determine the religious character of the newly emerging states at a time when there was more than one Christian faith from which to choose. The solution that emerged at the Peace of Augsburg of 1555 was that the faith of the state, and of its citizens, would be governed by the faith of the prince, "cuius regio, eius religio," Cobb, The Rise, *supra*, at 48; Cross & Livingston, The Oxford Dictionary of the Christian Church (2nd ed. rev. 1989), p. 108. This settlement again assumed the need for an overlap between the state (embodied in the person of the monarch) and the church, and the social cohesiveness that comes with having a common communal faith.

3. English History

English ecclesiastical history from the time of Henry VIII's reformation is particularly important for an understanding of the religion clauses of the First Amendment. At the very outset, Henry VIII's

Reformation assumed that the government "hath not only charge on the bodies, but also on the souls of his subjects," St. George, Doctor and Students (T. Plunkett & J.L. Barton, eds., Selden Society, 1974), cited in J. Guy, Tudor England (1988) 125-27. The passage of the Supremacy and Treason Acts of 1534 allowed for religious dissenters to be punished as traitors. The period of the English Reformation and its aftermath reflects the assumption that church and state had to work together, that the state had to insist on religious uniformity for its own protection and that of the society. The assumption was that only persons loyal to the religion of the state could be loyal to the state itself. It was this that James I meant when he insisted, "No bishop, no king", L. Levy, Blasphemy (1993) at 96-97.

Dissenting ministers were often accused of sedition when their religious views were inconsistent with the state religion. L. Levy, Blasphemy, *supra*, at 205-15; 235-36; 298-99; 307. Lord Hale explained

this conjunction in upholding landmark heresy prosecution (Taylor's Case, 3 Keble 607, 621):

> And . . . such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law.[6]

The harshness of the English establishment was ultimately softened by the Toleration Act of 1689, but it did not dispel the assumption that political and religious power had to overlap. "The Act of Toleration only recognized the rights of Dissenters to exist. They remained second-class citizens devoid of political rights in a country dominated by Anglicans." T.J. Curry, The First Freedoms: Church and State

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6. Even when blasphemy statutes were repealed, such prosecutions (often for what is more properly called heresy) were conducted under the common law on the theory that the expression of heretical views undermined the state's security. 4 Blackstone, 4.1.1; See L.W. Levy, Blasphemy (1993), at 357-358.

In America to the Passage of the First Amendment (1986) at 54 (hereafter, "Curry, First Freedoms").

4. The American Experience

Several American colonies were founded on the assumption that the political community should be organized along religious lines. Massachusetts and Connecticut are the most obvious examples. John Winthrop told the Massachusetts settlers that for their efforts to succeed they must "walk . . . humbly with our God . . . we need be knitt together in this worke as one man", Curry, First Freedoms, *supra*, at 6. As Curry summarizes it, the Massachusetts colonists were "certain that their colonies, in order to prosper, must be united in . . . Truth" as Congregationalism saw it. *Id.* at 5.[7] Those, like Roger Williams or Anne Hutchinson, who refused to conform, were expelled because they were, in Governor

7. For Connecticut, see Curry, First Freedoms, supra, at 3, 79-83.

Winthrop's words, "manifestly dangerous to the state." L. Levy, Blasphemy, *supra*, at 247.

Seventeenth century Quakers who openly challenged the official version of truth met a far harsher fate -- several of them were executed. A prominent Boston minister, in response to protests, defended these persecutions on the ground that Massachusetts was "originally a plantation religious, not a plantation of trade." Curry, First Freedoms, *id.* at 22.

It was not until 1691 that non-Congregationalists had any political rights in Massachusetts, P.V. Bonomi, Under the Cope of Heaven: Religion, Society and Politics In Colonial America (1986) (hereafter, "Bonomi, Under the Cope") at 61-62, and then only because the Crown felt obligated to protect the political rights of those citizens of Massachusetts who adhered to the established church of England.[8] The

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8. Somewhat earlier, recognizing the need to enfranchise some of those who under the rigorous prevailing Congregationalist (continued...)

new right to political participation did not extend to Catholics. C. Bridenbaugh, Mitre and Sceptre (1963) at 174.

Many of the other colonies had varying degrees of identification of churches with political power. "[I]n the minds of royal governors, religious and political centralization blended into a picture of social order that must be imposed on the colonies." Curry, First Freedoms at 58. The overlap of religion with politics was substantial. Pennsylvania in 1705 excluded Catholics, Jews and non-believers from the franchise, an exclusion that continued there and in other states until the Revolution and sometimes beyond. Bonomi, Under the Cope at 36.[9] In colonial

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8.(...continued)
(Calvinist) doctrines were not Church members, the leaders of Massachusetts adopted the half-way covenant that allowed greater numbers of citizens to be admitted to some sort of membership in the Church and hence to the franchise. See S.E. Ahlstrom, A Religious History of the American People, 158-60 (1972).

9. In Virginia, the Anglican Commissary sought to create ecclesiastical courts to try offenses against public morality, Bonomi, Under the Cope at 43, a proposal that met with great (continued...)

South Carolina, church "parishes were becoming key units of local government." Bonomi, Under the Cope at 49.

Opponents of established churches were quick to point out that one of the costs of organizing politics along religious lines was the exclusion of potential immigrants who would not go to those colonies in which they were not welcome to participate in communal affairs. Nevertheless, Virginia's established church pushed non-conformists out of the state into neighboring Maryland. Curry, First Freedoms at 30, 42. Colonies like Georgia, which had only the mildest of establishments eschewed more rigorous forms precisely in order to encourage immigration. Curry, First Freedoms at 38 (Maryland); Bonomi, Under the Cope at 31-33 (same

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9.(...continued)
resistance, as did other efforts to bring an Anglican bishop to the United States, because it was perceived as an attempt to recreate the hated partnership of church and state. Larkin v. Grendel's Den, supra, 459 U.S. at 127, n.10; see C. Bridenbaugh's suggestively titled book, Mitre and Sceptre (1963).

as to Carolina)[10]. See also 5 The Founders Constitution at 58 (remarks of Patrick Henry).

B. The Drafting of the Constitution Shows An Intent to Exclude Religious/Political Unions

The history of the efforts to draft a constitutional doctrine that would prevent a recurrence of the evils of establishment has been recounted on many occasions in the opinions of this Court, and need not be detailed here at length.[11] That history demonstrates clear determination to avoid the errors of the more distant past as well as more recent forms of established religion.

The Virginia debate on the subject of religious liberty was closely followed and widely influential -- and, as the Court has recognized, particularly important to understanding the First Amendment

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10. North Carolina's 1669 Constitution did limit the privilege of free-holders to those who acknowledged God. 5 The Founders Constitution at 51.

11. See, e.g., Everson v. Bd. of Ed., 330 U.S. 1 (1947); id. at 28 (Rutledge, J., dissenting); Engel v. Vitale, 370 U.S. 421 (1962); Lee v. Weisman, 112 S.Ct. 2649, 2669-76 (1992) (Souter, J., concurring).

itself, *PEARL* v. *Nyquist*, 413 U.S., *supra*, at 770, n.28 (1973); *Engel* v. *Vitale*, *supra*, 370 U.S. at 428. In the end, Virginia swept away all vestiges of establishment, including, notably, political advantages for adherents of the established church. T.E. Buckley, Church and State In Revolutionary Virginia (1977) at 113-72.

Defenders of the status quo understood that their opponents were not just attacking actual political or religious oppression, but the assumption that the unity of church and state was indispensable for the social good. The status quo assumed that:

> . . . [religion] needed public expression not only for its own maintenance but also to build the common basis of confidence and trust among men. Believing in and worshiping the same God would make men cognizant of the fact that they were all operating under the same general principles. Consequently, the government should be concerned to provide a "competent provision" for those who had devoted their lives to the promotion of religious belief and the inculcation of moral values.

T.E. Buckley, *supra*, Church and State In Revolutionary Virginia at 142; see *id.* at 95.

Some of those who opposed ratification of the Constitution decried the absence of a strong guarantee of full equality for members of all faiths. This was so despite the fact that the right to political equality at the level of federal office-holding was written into the body of the Constitution in the No Religious Test Clause of Article VI. That Clause itself marked a sharp break between the older system of organizing politics on religious lines and the newer secular politics. It was opposed and defended in full recognition of the scope of that change. See 4 The Founders Constitution at 633-46.

Justice Story summed up the change wrought by Article VI in his influential treatise on constitutional law:

> This [no tests] clause is not introduced merely for the purpose of satisfying the scruples of many respectable persons, who feel an invincible repugnance to any religious test, or affirmation. It had a higher objective; to cut off for ever every

> pretence of any alliance between church and state in the national government. The framers of the constitution were fully sensible of the dangers from this source, marked out in the history of other ages and countries; and not wholly unknown to our own.

Commentaries on the Constitution (reprint ed. 1987, R.D. Rotunda and J.E., Nowak, editors) at p. 690-91.

The First Amendment carried this principle of "cutting off any alliance between church and state" still further, *Torcaso* v. *Watkins*, 367 U.S. 488, 491-92 (1961), so as to preclude any effort either to limit the franchise on religious lines or to align religion with political power. Alerted by a suspicious citizenry[12] to the dangers to liberty of even a partial concord between religious preachment and the exercise of political power, the Framers were not prepared to tolerate even partial combinations of political power

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12. See, e.g., 5 The Founders Constitution at 12 (protest of New York ratifying convention); 18 (North Carolina).

and religion.[13] The result was the Establishment Clause.

Given this history, then, it is clear that those who demanded, drafted and ratified the Establishment Clause were fully aware of the danger of organizing politics along religious lines and intended to foreclose that possibility at the federal level. The Framers, indeed, prohibited all practices tending toward -- "respecting" in the language of the Constitution -- an established church. "A law may be one 'respecting' the forbidden objective while falling short of its total realization." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971), cited in *PEARL* v. *Nyquist*, *supra*, 413 U.S. at 770. A fortiori, it follows that the Founders would not have tolerated a deliberate effort to facilitate political power solely along religious lines, which is in itself an establishment.

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13. See, T.J. Curry, The First Freedoms: Church and State In America to the Passage of the First Amendment (1986) 210-14; D. Laycock, Nonpreferential Aid to Religion: A False Claim About Intent, 27 Wm. & Mary L.Rev. 875 (1986).

C. Subsequent History

Because the issue was so decisively settled with the adoption of the First Amendment, there are not many subsequent events which test the principle. But what there is is fully consistent with the holding in *Larkin*. In the 1830s, Congress was urged to close the Post Office on Sundays on the ground that its opening on those days was inconsistent with Christianity. A House committee rejected these calls "to unite church and state" or to "unite politics and religion" and announced an understanding of the First Amendment pertinent here. "All religious despotism commences by combination and influence"; and "the catastrophe of other nations furnishes an awful warning of the consequences . . . ." H.Rep. 87, 21 Cong., 1st Sess., reproduced in W. Lowrie and W. Franklin, American State Papers: Class VII (1834), 229-231. See 2 A.P. Stokes, Church and State In the United States (1950) at 12-20.

The fight over the admission of Utah as a state is also instructive. Here Congress sought to impose

the non-establishment principles of the First Amendment in the face of what was for a time a full-fledged theocracy. Apart from the issue of polygamy, many Americans opposed the creation of a state organized along religious lines and controlled entirely by the Mormon church, a position that contributed to a denial of statehood for some time. 2 A.P. Stokes, *supra*, Church and State In the United States at 46-47. Ultimately, Congress relented, but to appease Congress, Utah's constitution provided (and still provides) that "there shall be no union of Church and State nor shall any church dominate the State or interfere with its functions," Utah Constitution, Article I, § 3 (emphasis added).[14] The "no union of church and state" proviso was directly tailored to guard against what Justice Powell termed the exercise of significant religious control over democratic processes. That opposition to Utah

14. For a history of this provision, see Society of Separationists v. Whitehead, 1993 W.L. 521202 (Utah 1993) at *7, 14, 17.

statehood reflects an understanding of the First Amendment inconsistent with the actions of the New York legislature in this case.

What few cases there are considering actual unions of church and state also point in the direction of the unconstitutionality of KJSD.[15] *State* v. *Celmer*, 80 N.J. 405, 404 A.2d 1 (1979) and *Oregon* v. *Rajneeshpuram*, 598 F.Supp. 1208 (D. Oregon 1984) are particularly instructive. In both these cases, a group of people drawn together for religious purposes sought or had attained municipal incorporation. In each, the incorporation was challenged as an establishment. In neither was the

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15. In People v. Rose, 92 Misc.2d 429, 368 N.Y.S.2d 387 (Sup.Ct. Rockland County, 1975) the court invalidated a judicial proceeding which was held in a girls' religious school in the town of New Square. Like Kiryas Joel, New Square is a town composed exclusively of Hasidim. Among the grounds for invalidating the proceeding was the fact that the hearing took place in a Jewish parochial school in violation of the principle that religion may not be closely associated with the exercise of political power. 82 Misc.2d at 431, 368 N.Y.S.2d at 391.

use of municipal power to further theological positions at issue.

In *Celmer*, the New Jersey Supreme Court held that the incorporation was invalid under the Establishment Clause. The governing body of the city was the governing body of the religious corporation, the Ocean Grove Camp Meeting, a Methodist establishment. And even though that was not the case in *Rajneeshpuram*, the District Court nevertheless refused to dismiss a claim that Oregon could not constitutionally recognize the incorporation of a township intentionally organized along religious lines.

The only distinction between this case and these precedents is a bare formality of legal form. KJSD is not formally a religious body. But as this Court held in *Lee* v. *Weisman*, *supra*, 112 S.Ct. at 2659, the "[l]aw reaches past formalism" to protect religious liberty.

III
THE BACKGROUND FACTS LEAVE NO DOUBT AS TO THE RELIGIOUS NATURE OF THE SCHOOL DISTRICT

It remains to demonstrate that the bar against overlapping political and religious power is applicable here. There is no room for dispute on this score. KJSD embodies only the Village of Kiryas Joel, an all-Hasidic community [Joint Appendix at 8-17], which seceded from the larger town of Monroe. *Id*. at 10-12. Kiryas Joel's boundaries were carefully drawn to exclude all non-Hasidim, a sort of reverse Tuskegee, *Gomillion* v. *Lightfoot*, *supra*. An earlier proposal to create the Village was withdrawn because the boundaries encompassed non-Hasidim. *Id*. at 13. It is this Hasidic-only village -- and only this village -- that comprises KJSD.

Governor Cuomo's message approving the legislation creating KJSD expressly noted that "the Village of Kiryas Joel['s] . . . population are all members of the same religious sect." *Id*. at 40-41. The legislative sponsor acknowledged that the

District was created to serve "the Hasidic Jewish community [which] holds firmly to its religious tenets." *Id*. at 19-20. Similarly, Petitioner Monroe-Woodbury School District, writing to the Governor to announce it supported the legislation, noted that no non-Hasidic family lived within the Village of Kiryas Joel.[16] *Id*. at 21-22]. From all of this, it is plain that the rationale for the KJSD was solely religious. No geographic, economic, class, historic factor other than religion can explain the configuration of KJSD.

The presence of an intent to create a religious-political enclave readily serves to distinguish this case from the common happenstance in which some religious group predominates in a community. This distinction is entirely in keeping with general principles of constitutional law, which provide that a malignant purpose or an intent to further an illicit

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16. Petitioner Monroe-Woodbury School District stated that if any non-disabled child within KJSD wanted to attend public school he or she would attend Monroe-Woodbury school, with KJSD paying tuition. KJSD has no facilities for the non-disabled student. Id.

purpose can invalidate an otherwise permissible act because, as Justice O'Connor has explained, it suggests an improper balancing of costs and benefits, with illicit benefits weighed in the scales. *Wallace* v. *Jaffree*, *supra*, 472 U.S. at 75 (O'Connor J., concurring).

A school district that happens to be all-white or all-black as a result of no identifiable discriminatory act is constitutional, *Miliken* v. *Bradley*, 418 U.S. 717 (1974); a district created to segregate is the unconstitutional ev'l *Brown* v. *Bd. of Education*, 344 U.S. 1 (1954) struck down. See *U.S.* v. *Scotland Neck*, 407 U.S. 484 (1972), *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972). Similarly, some neutral regulations of charities are permissible; regulations aimed at suppressing a particular religious charity are not, *Larsen* v. *Valente*, 456 U.S. 228 (1982); a sales tax on newspapers is constitutional; one aimed at suppressing political

criticism is not, *Minneapolis Star Tribune* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

The immediate impetus that triggered the establishment of KJSD was the refusal of Petitioner Monroe-Woodbury in the wake of *Aguilar* v. *Felton*, 473 U.S. 402 (1985)[17] to provide special educational services to Hasidic children at sites other than its own public schools. The violation identified in *Aguilar* was that, under public control, public officials taught in a parochial school. KJSD is a far greater violation of the Constitution.

In its incarceration as KJSD, the Hasidic community receives more than government assistance. It exercises the power to tax any property within its jurisdiction; it has the power to regulate any child attending its school; it has the power to spend for any purpose related to the school or its function; it has the power to design curriculum and programs and

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17. See Monroe-Woodbury School District v. Weider, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988).

impose them on all families within its jurisdiction; and it has all the other political and governmental powers of a public school district. It is a lesser violation of the Establishment Clause to provide for special education for the disabled in a private religious school; it is far worse to turn a religious community into a governmental entity and give it both public money and governmental power.

The configuration of KJSD was solely religious, just as colonial Massachusetts and Connecticut were set up with religion as the organizing principle of the political unit. In creating KJSD, New York impermissibly "foster[ed] the creation of political constituencies along religion lines." *Lynch* v. *Donnelly*, *supra*, 465 U.S. at 688 (O'Connor, J., concurring). KJSD in fact is an unconstitutional "state or local embrace of a particular religious sect." *Lamb's Chapel* v. *Center Moriches School District*, *supra*, 113 S.Ct. 2141, 2151 (1993) (Scalia and Thomas, JJ., concurring).

IV
THE LEMON TEST SHOULD NOT BE RECONSIDERED

The court below did not adopt the specific theory we advocate in Points I-II of this brief. Instead, a majority found that the legislation creating KJSD had the impermissible effect of advancing religion in violation of the second prong of the tripartite test of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). For the reasons assigned by the Respondents, the conclusion that the legislation creating KJSD is inconsistent with *Lemon* is unassailable. It need not be defended here either under the traditional *Lemon* analysis or the alternative understanding suggested by Justice O'Connor in *Lynch* v. *Donnelly supra*, 465 U.S. at 688-90, and assimilated into the *Lemon* test in *County of Allegheny* v. *A.C.L.U.*, *supra*, 492 U.S. at 593.[18] The

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18. We do note that it is difficult to translate a test designed to identify cases in which government improperly identifies itself by word or symbol with religion – the primary thrust of (continued...)

Court of Appeals was bound by *Lemon*. Despite criticism, *Lemon* has "not been overruled", *Lamb's Chapel* v. *Center Moriches School District*, 113 S.Ct. 2141, 2148, n.7 (1993), and is constantly applied in this Court and lower state and federal courts.

Petitioners (other than New York State) in this Court argue not only that KJSD's creation did not run afoul of any of *Lemon*'s three prongs, but that the doctrine ought to be dispensed with entirely, at least to the extent that it is applied to laws "designed to remove barriers that prevent religious minorities from practicing their religion." [KJSD Brief at 44-45; Monroe-Woodbury Brief at 45-49]. They suggest that the true purpose of the religion clauses is religious

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18.(...continued)
Justice O'Connor's test in Lynch and County of Allegheny – to this case, where the State of New York has in fact set up a public school district along religious lines. While amici believe that verbal or symbolic endorsements of religion can be unconstitutional, such violations pale in comparison to the magnitude of the violation here. Just as a jeweler's scale cannot be used to weigh a truckload of gravel without being crushed, so too a test designed to check endorsements is overwhelmed by a full-fledged established religion.

liberty and that accommodation, not separation, is the essence of religious liberty. *Amici* on the other hand believe that, while accommodation is an essential element of religious liberty, separation is no less integral to constitutional principle of religious liberty.

Petitioners would have the Establishment Clause limited to the "evils" at which the Clause was directed -- "sponsorship, financial support, and active involvement . . . in religious activity . . . ." [KJSD brief at 44, citing *Walz* v. *Tax Comm'n*, 397 U.S. 664, 668 (1970).] We have already demonstrated in Points I and II that this case, involving a joint enterprise between church and state and a sharing of political authority between them, presents the very evils *Walz* identifies as targets of the Establishment Clause. Because it is unnecessary to apply the *Lemon* test in this case, there is no need to reconsider that case here, for in any event,

Petitioners have not made out the requisite showing to overcome a settled rule of constitutional law.

Stare decisis applies to constitutional decisions as well as to statutory ones, *Planned Parenthood* v. *Casey*, 112 S.Ct. 2791 2808-09 (1992), for "the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Patterson* v. *McC'an Credit Union*, 491 U.S. 164, 172 (1989), citing *Welsh* v. *Texas Department of Highways*, 483 U.S. 468, 494 (1987). Even in constitutional cases, *stare decisis* "carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'" *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984), cited in *Payne* v. *Tennessee*, 111 S.Ct. 2597 (1991) (Souter, J., concurring).

In *Planned Parenthood*, the Court pointed to several "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law." 112 S.Ct.

at 2808. The weight accorded *stare decisis* at a minimum means that no case should be overruled unless the outcome of the subsequent case would be different. Overruling *Lemon* does not change the result here. On any historically or precedently grounded test, KJSD is unconstitutional.

The criteria to which the Court pointed in *Planned Parenthood* are: 1) whether the rule is unworkable in practical terms; 2) whether there is some special kind of societal reliance on the prior rule; 3) whether related principles of law developed so as to leave the old rule a remnant of a repudiated approach; and 4) whether social circumstances have changed so as to leave the old rule without application or justification. And although unstated in *Planned Parenthood*, implicit in its discussion was the question of whether the prior case was wrongly decided. Applied to *Lemon* each of these criteria (which we take up in slightly different order) negates the existence of "special circumstances" which are a

necessary predicate to overruling a constitutional decision.

A. *Lemon* Is Not Unworkable

One of the common criticisms of *Lemon*, echoed by some of the Petitioners, is that the tripartite test of *Lemon* is not workable, that it does not lead to predictable results. Petitioners assert that their proposed test will solve these problems. But Petitioner KJSD's suggestion that the rubric of "sponsorship, financial support and active involvement in religious activity" is more readily applied than the *Lemon* test does not withstand scrutiny.

Does funding religious based sex education constitute "financial support" of religion? See *Bowen* v. *Kendrick*, 487 U.S. 589 (1988). What of aid to parochial schools in its various forms? Compare *Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985) with *PEARL* v. *Regan*, 444 U.S. 646 (1980). Is display of a municipal creche "active involvement in

religious activity"? Compare *County of Allegheny* v. *A.C.L.U.*, *supra*, with *Lynch* v. *Donnelly*, *supra*. Does inviting a minister to offer a prayer at high school graduation constitute "sponsorship . . . or active involvement in religious activity"? *Lee* v. *Weisman*, *supra*. What about permitting students to offer such a prayer upon vote of their peers? Compare, *Jones* v. *Clear Creek ISD*, 977 F.2d 963 (5th Cir. 1992) with *Gearon* v. *Loudoun County School Bd.*, 93-730-A (E.D. Va. 1993).

Nor is certainty of adjudication materially advanced by adopting a "coercion" standard,[19] as Justice Kennedy, joined, *inter alia*, by Justice Scalia, suggested in *County of Allegheny* v. *A.C.L.U.*, *supra*. Justices Kennedy and Scalia themselves disagreed over the application of that standard in *Lee* v.

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19. The difficulty the courts had in administering the coercion test prior to Miranda v. Arizona, 384 U.S. 436 (1966) is instructive.

Weisman, 112 S.Ct. 2649 (1992), both finding it an easy case, one confident that coercion existed, 112 S.Ct. at 2658-59, the other insisting the claim was "incoherent." 112 S.Ct. at 2681.

The problem is not that the existing *Lemon* standard is unworkable, as Petitioners charge. Lower courts have managed to apply *Lemon* for a quarter of a century. Rather, it is the difficulty of applying the Establishment Clause to a kaleidoscope of fact patterns, each with its own unique twists, that creates difficult cases. Cases reaching this Court in particular are likely to be hard, and will often call for careful line-drawing. Any test that both takes the Constitution seriously and respects democratic self-governance will require careful line-drawing. *Lemon* does both.

Petitioners' quarrel is not with the Court's formulation of a test; it is that the Court's decisions take the Establishment Clause seriously. That Clause, at a minimum, bars joint exercises of power

by religion and government, and it will, of necessity, limit religion and religious institutions in at least some ways not applicable to secular ideologies and institutions.

B. The *Lemon* Rule Is Fully Woven Into The Texture Of The Law

In calling for the overruling of *Lemon*, Petitioners are challenging more than just its three-part test. The *Lemon* test did not spring full blown from the brow of Zeus. In announcing it, Chief Justice Burger did not purport to announce a new rule. Instead, he anchored the tripartite test firmly in past decisions:

> Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz*, *supra*, at 674. (emphasis added)

403 U.S. at 612-13.

Ironically, Chief Justice Burger, citing *Walz*, said that this tripartite test was intended to flesh out the "three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement in religious activity,'" 403 U.S. at 612, the very test that KJSD says should take the place of the three-part test. The grounding of *Lemon* in the part of *Walz* to which Petitioners point was again emphasized in *PEARL* v. *Nyquist*, *supra*, 413 U.S. at 770-73. The purpose and effect branches of *Lemon* were lifted *in hac verba* from *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963). The entanglement branch came directly from *Walz*, the very case that Petitioners say reflects a truer understanding of the Establishment Clause than *Lemon*.[20]

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20. Tellingly, Petitioners and their amici offer no single alternative to Lemon. KJSD suggests language from Walz, but (continued...)

In sum, Petitioners take aim not just at *Lemon*, but at all those cases whose holdings it subsumes. Just as certainly, because *Lemon* is so firmly rooted in all of this Court's modern Establishment Clause jurisprudence, and because it has well served the interests of religious freedom and peace that *stare decisis* powerfully calls for its reaffirmation, not its demise.

C. *Lemon* Was Correctly Decided

The Court has repeatedly canvassed the history of the First Amendment, and concluded that it embodies a principle of neutrality, not just non-preferentialism, which has been the major alternative offered by critics of *Lemon*. Although the Court's

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20.(...continued)
as demonstrated, that language gave birth to the Lemon test. Monroe-Woodbury proffers either a non-preferential approach inconsistent with the Clause's history, or a general acceptance of anything labelled accommodation. Amici supporting Petitioners propose various alternatives, from abandoning the effect test, to modifying it, to adoption of a pure coercion test. The lack of a self-evidently better rule upon which all of Lemon's critics can agree is further reason not to overturn Lemon.

accepted reading of the Establishment Clause as embodying a policy of separation has been challenged, R. Cord, Separation of Church and State (1982), more recent historical research by scholars such as Leonard Levy,[21] Thomas Curry[22] and Douglas Laycock,[23] proves that the non-preferentialist approach is historically untenable, as even scholars critical of "separationism" acknowledge. M. McConnell, Religion at the Crossroads, 59 U.Chi.L.Rev. 115, 146, n.142 (1990).

D. There Has Been Substantial Reliance on *Lemon*

Moreover, given *Lemon*'s origin as a restatement of prior law, its demise, particularly on the unusual facts presented here, would cast doubt on every prior decision of this Court, and of the lower courts,

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21. L.W. Levy, The Establishment Clause: Religion and The First Amendment (1986).

22. Curry, First Freedoms, supra.

23. D. Laycock, Non-Preferential Aid to Religion: A False Claim About Intent, 27 Wm. & Mary L.Rev. 875 (1986).

all of which now, and for almost 25 years, have regularly applied *Lemon*. Overruling *Lemon* would not elucidate questions encountered by the courts with greater frequency than the unusual one presented here. Abandoning *Lemon* here would gratuitously impose upon legislatures, state attorneys generals and school boards the burden of re-litigating issues long settled, certainly legally, and, in large part, socially as well, and all to no point, because the judgment below would in any event be reaffirmed.

V
KIRYAS JOEL SCHOOL DISTRICT IS NOT A PERMISSIBLE FORM OF ACCOMMODATION

Some of Petitioners and their *amici* also urge that *Lemon* should be overruled because it interferes with the accommodation of minority religions and hence does not respond to the changes in social reality of late 20th century America. [KJSD Brief at 40-43; Monroe-Woodbury Brief at 45-49.] They complain

that under *Lemon*, the Establishment Clause wholly swallows up the Free Exercise Clause, and with it any notion of accommodation. We agree that a reading of the Establishment Clause that prohibited any accommodation would be wrong. But *Lemon* does not countenance, much less mandate, such a departure from neutrality. The same court which decided *Lemon* decided *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), perhaps this Court's most far reaching application of the doctrine of accommodation.

Petitioners also fail to explain why their proposals would not allow the accommodation doctrine to swallow up the Establishment Clause, especially in those cases where a particular accommodation is discretionary, not mandatory, as concededly is the case here. [KJSD Brief at 42.]

Apart from the untenable nature of the argument, which flies in the face of numerous "accommodation" decisions, Petitioners' accommodation argument is also not new; practically every

practice that has been condemned by this Court as an establishment has been defended as an accommodation. See, *e.g.*, *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Lee* v. *Weisman*, *supra*. And while there may be somewhat greater religious diversity now than when *Lemon* was decided, the problem of accommodation was far from unknown then, even for radically separatist sects. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). The difficulty of reconciling accommodation and separation was also not unknown before the *Lemon* test was formulated, *Sherbert* v. *Verner*, *supra*, 374 U.S. at 422 (Harlan, J., dissenting).[24]

Defining the boundaries of permissible accommodation has proven quite difficult for this

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24. If there is a contemporary threat to accommodation – and there is – it comes from this Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), a Free Exercise Clause decision, not from its Establishment Clause decisions.

Court as the several opinions in *Texas Monthly* v. *Bullock*, 489 U.S. 1 (1989) demonstrate. *Amici* are quite certain that the solution does not lie either in committing all accommodation to the unfettered discretion of the legislature, as this Court unfortunately did in *Employment Division* v. *Smith*, *supra*, or in permitting anything that can plausibly be called an accommodation to pass constitutional muster, a proposition rejected in *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985).

This Court's cases suggest several limitations. Accommodation imposing significant costs or burdens on, or compelling religious conformity of, other persons, will generally be impermissible. *Estate of Thornton* v. *Caldor, Inc.*, *supra*. There is some evidence that religious conformity is insisted upon here, J. Mintz, Hasidic People, *supra*; *Waldman* v. *UTA*, 147 Misc.2d 529, 558, 558 N.E.2d 781 (Sup.Ct. Orange County, 1990).

Justice O'Connor has suggested that an accommodation must remove an active state-created burden from the shoulders of the believer, and that, absent such a burden, government support for religion is an establishment, not an accommodation. *Wallace* v. *Jaffree*, *supra*, 472 U.S. at 81-83. Since Petitioners have disclaimed any separatist religious doctrine that would, as a religious matter, prohibit them from attending classes under secular control, see KJSD Brief at 7, it is difficult to see what state-created burden on religious practice the New York legislature has removed by creating KJSD.[25] Under Justice O'Connor's *Jaffree* formulation, too, KJSD is an establishment of religion.

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25. Amici are not qualified to pass on the question of whether the Satmar Hasidim have a formal religious mandate requiring separatism. They do note that religion consists of a mix of formal beliefs, mandatory practices or ceremonies, and customary observances. Each faith has its own nuanced version of these principles, frequently unintelligible to the outsider, and always difficult to explain and delineate. These various sources of practice, ceremony or belief may be all religious for constitutional purposes, even if not formally mandated. See Callahan v. Wood, 658 F.2d 679 (9th Cir. 1981).

The problem of accommodation arises from a tension between the Establishment and Free Exercise Clauses. It makes sense to accommodate religion in ways that drain neither Clause of its core meaning. That was the cautious approach taken by Justices Blackmun and O'Connor in *Texas Monthly* v. *Bullock*, *supra*.

In *Texas Monthly*, the Court invalidated a sales tax exemption for religious periodicals but not for competing secular ones. After explaining why it was so difficult to settle on a precise formulation of a test for distinguishing permissible and impermissible accommodation, Justice Blackmun explained that "a statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." 489 U.S. at 28. An effort to "create political constituencies along religious lines" is likewise "constitutionally intolerable." Creating such constituencies is not an

accommodation that a government bound by the Establishment Clause can offer.

VI
THE PRESENCE OF CONSTITUTIONAL MEANS OF DELIVERING EDUCATIONAL SERVICES DOOMS KJSD

The effort to label KJSD an accommodation of religion despite its utter incompatibility with the Establishment Clause falters for yet another reason -- it is an accommodation far more intrusive on Establishment Clause values than need be to ensure services to the disabled children of Kiryas Joel. Such excessive intrusion leads inescapably to the conclusion that KJSD was created not as an accommodation, but rather as an advancement, of religion, as the New York Court of Appeals held.

The record suggests that the gap between Hasidic children and their public school peers was so great that it was not educationally feasible to put them in the same classroom. We accept for the moment the truth of these claims. Monroe-Woodbury School District had available to it a ready remedy that would

not have impinged on the Establishment Clause -- the use of a so-called "neutral site," under the control of the Monroe-Woodbury School Board, but serving only Hasidic children. If selected for secular reasons, such as ensuring the educational effectiveness of the instruction provided, or providing bilingual instruction in Yiddish, such neutral siting is constitutional.

Wolman v. *Walter*, 433 U.S. 229 (1977) is dispositive. There, the Court held that it would be constitutional to provide remedial services to parochial school students in off-premise facilities:

> The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in *Meek*. The influence on a therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers (of improper effect and entanglement) perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils.

433 U.S. at 244.

Aguilar v. *Felton*, 473 U.S. 402 (1985) reinforced this rule, even as it emphasized that secular instruction could not take place on the premises of parochial schools. In her dissent, Justice O'Connor explained the majority's ruling:

> Our Establishment Clause decisions have not banned remedial assistance to parochial school children, but rather remedial assistance on the premises of the parochial school. Under *Wolman* . . . the New York city classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. (emphasis added)

473 U.S. at 420. The lower federal courts since *Aguilar* have uniformly upheld off-premises arrangements.[26]

The difference between a neutral site and KJSD is plain. The neutral site would create no political entity along religions lines. No religious group

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26. Barrnes v. Cavazos, 934 F.2d 912 (8th Cir. 1992); Pulido v. Cavazos, 966 F.2d 1056 (6th Cir. 1991) (dismissing appeal on procedural grounds; court below in accord); Walker v. San Francisco U.S.D., 761 F.Supp. 1463 (N.D. Cal. 1991), appeal pending (9th Cir.)

controls the neutral site. Students who do not wish to avail themselves of the neutral site, and who prefer to participate in the regular school, are free to do so. Given the existence of KJSD, a disabled student in the Village of Kiryas Joel who desires a public school education is coerced to attend a religiously segregated public school, the equivalent of state imposed racial segregation. And for the reasons expressed in *Wolman*, the neutral site does not otherwise establish religion.[27] By contrast, KJSD does all of these forbidden things. It therefore falls on the wrong side of the constitutional line.

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27. The New York Court of Appeals recognized that neutral sites were an available alternative, Bd. of Educ. v. Weider, 72 N.Y.2d 174, 531 N.Y.2d 889, 527 N.E.2d 767 (1988), but felt itself powerless to order it. This Court, however, has the power to enter such order "as is just", 28 U.S.C.§ 2106. In light of ten years of litigation and the urgent need of the Hasidic children for special education, it would seem "just" for this Court to order Petitioner Monroe-Woodbury School District to implement a neutral-site plan, or to cast its mandate so that the New York Court of Appeals may do so.

CONCLUSION

These are perilous times for common school education. The very idea of a common school is under broad attack, and with it the premise, implicit in cases such as *Brown* v. *Bd. of Educ.*, *supra*, that public schools have an obligation to serve all children.

KJSD dismisses the unfairness of creating a school district for this religious community. It suggests that no other group is likely to be as seriously affected. [KJSD Brief at 46-47.] The claim ignores the many religious communities intensely dissatisfied with the public schools over creationism, outcome based education, sex education and 'secular humanism'. They (and their opponents) would be happy to create fiefdoms of religious or non-religious homogeneity if this Court confers its constitutional blessings on KJSD.

When all is said and done, this is an easy case.

The judgment below must be affirmed.

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February 23, 1994

APPENDIX

APPENDIX A

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles CRC of Jewish Federation-Council
Oakland Greater East Bay JCRC
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Connecticut Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council

Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley
JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation-Community Council
Baltimore JCRC
Greater Boston JCRC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis JCRC
Omaha JCR Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC of Jewish Federation
Albuquerque JCC
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation

Elmira CRC of Jewish Welfare Fund
Greater Kingston Jewish Federation
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC
Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish
Community Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of
the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation

Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council